

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 22, 2006 Session

**RJS and TLPB v. STATE OF TENNESSEE DEPARTMENT OF
CHILDREN'S SERVICES, In Re: ETB, a Juvenile**

**Direct Appeal from the Juvenile Court for Cumberland County
Nos. 6023 and 6074 Hon. Steven C. Douglas, Judge**

No. E2006-00240-COA-R3-PT - FILED JUNE 21, 2006

The Trial Court terminated the parental rights of the child's mother and father. Both parents appealed. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Juvenile Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Margaret Jane Powers, Crossville, Tennessee, for appellant, RJS.

C. Douglas Fields, Crossville, Tennessee, for appellant, TLPB.

Paul G. Summers, Attorney General and Reporter and Amy T. Master, Assistant Attorney General, Nashville, Tennessee, for Appellee.

OPINION

Petitions for Termination of Parental Rights were filed against the mother TLPB and the father, RJS, on December 30, 2004.

A trial was held on November 23, 2005, regarding the termination of the parental rights of both parents to the child, EB (dob: August 8, 2001).

At the conclusion of the trial, the Court made findings of fact from the bench and found that the State had proved abandonment and failure to comply by clear and convincing evidence. The mother had no credible proof of her contentions that she was working and off drugs, no proof regarding her home, and she was living with a man that she did drugs with previously and who had pending criminal charges. The Court found the mother made no effort to maintain contact with the child and that she gave up at some point. The Court found that the mother had two opportunities to go to rehabilitation, but failed to follow through and that essentially the mother had not been a mother to the child for three of his four years, the foster home was the only home the child had known and it would be against the child's best interest to remove him from that home.

In the Trial Court's detailed fact finding, the Court found the mother had not visited with the child since May 2004, and that the mother agreed to go to drug rehab and had two opportunities for the same through the General Sessions Court. DCS offered to transport the mother to rehab on two occasions but she declined. The Court found the mother had moved to Alabama with her boyfriend and had another child, and it was only after she was served with the termination petition did she return to Tennessee to face her pending criminal charges.

The Court found the mother went many months without any contact with the child. The case manager had to track mother down, and the mother made no effort to stay in contact. The court said there was "no justifiable excuse for failing to visit or even inquire as to her son's welfare." The court concluded the mother had abandoned the child by willfully failing to visit him for more than four months, and had failed to establish a suitable home for the child, and comply with her plan.

Regarding the father, the Court found that he was incarcerated, had never completed drug rehab even though he had the opportunity to do so, and he had several criminal convictions. The Court found that the conditions leading to removal still persisted, and that there was little likelihood they would be remedied in the near future. The Court further found the father had failed to establish a suitable home, and had failed to maintain contact with DCS.

The Court found by clear and convincing evidence that grounds for termination were established and that termination was, in fact, in the child's best interest. The parents have appealed and raise these issues:

1. Whether mother's actions constitute abandonment under the law by clear and convincing evidence?
2. Whether mother's actions demonstrate a lack of concern for her child to such a degree that it appears unlikely that she will be able to provide a suitable home for her child at an early date?
3. Whether mother was in substantial non-compliance with her permanency plan?

4. Whether clear and convincing evidence supports the trial court's determination that termination of mother's rights was in the child's best interests?
5. Whether DCS made reasonable efforts on behalf of mother?
6. Whether the trial court erred in finding sufficient statutory grounds for the termination of father's parental rights?
7. Whether the trial court erred in finding that the evidence presented at trial satisfies the clear and convincing standard of proof required?
8. Whether the trial court erred in finding incarceration to be a persistent condition under Tenn. Code Ann. §36-1-113(g)(3)(I), or is same solely controlled by Tenn. Code Ann. §36-1-113(g)(6)?

A parent has a fundamental right to the care, custody, and control of her children. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972). Such right is not absolute, however, and may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982).

When reviewing a trial court's decision to terminate parental rights, we have previously recognized that we must affirm the termination if the record contains clear and convincing evidence to support any of the statutory bases found by the trial court. *In re C.W.W.*, 37 S.W.3d 467 (Tenn. Ct. App. 2000). We have also explained that "clear and convincing" is a more stringent requirement than a preponderance of the evidence, but less stringent than "beyond a reasonable doubt." *O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995).

In this case, the Trial Court terminated the parental rights of the mother based upon the statutory grounds of abandonment and failure to substantially comply with the plan of care. Additionally, the Court found that terminating the mother's parental rights was in the child's best interest.

The mother argues her parental rights should not have been terminated, because there was no clear and convincing evidence of the grounds. She argues that she was in a catch-22 situation and felt she had no choice but to go to Alabama to try and get off drugs, because Agape did not offer adequate help. But she basically concedes, however, that she abandoned the child pursuant to the statutory definition, in her brief by stating:

Ms. Patton never really argues that her actions did not amount to the statutory definition. It happened. She gave up. That's pretty much abandoning and she was out of touch for way more than four months.

Her basic argument is that she abandoned for a good reason.¹

The mother admits that the definition of abandonment is failure to visit or support for four months, when a person is aware of her duty to visit/support, and has the capacity to do so, but makes no effort and has no justifiable excuse for failing to do so. *In re: Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005). Tenn. Code Ann. § 36-1-102(1)(A).

The Court found that the mother had the capacity to visit the child, but failed to do so, made no effort to do so, and had no justifiable excuse for her failure. The Court found the mother failed to pay support for the child.² The evidence supports these findings.

The evidence establishes that the mother chose to go to Alabama with the father of her youngest child, and did not remain in contact with DCS. She explained her actions by stating that she had “given up” and felt there was “nothing left here”. After thirteen months, the mother suddenly changed her mind (after being served with the petition) and contacted DCS. The mother testified that she worked for a few months and was able to pay her bills, but never paid any support for the child. There is clear and convincing evidence that the mother willfully abandoned her child, and we affirm the Trial Court’s decision on this ground. Also, there is clear and convincing evidence that the mother failed to comply with the Plan of Care.

Finally, the mother asserts that DCS did not make reasonable efforts to help her, which is required by Tenn. Code Ann. §36-1-113 (i)(2). This section states that when determining whether a termination is in the child’s best interests, the court should consider whether the parent has “failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible.” *Id.* We have previously recognized that DCS must make “reasonable” efforts, not “herculean” efforts. *DCS v. Malone*, 1998 WL 46461 (Tenn. Ct. App. Feb. 5, 1998). The requirement of reasonable efforts is outlined in Tenn. Code Ann. §36-1-113 (I). Thus, any efforts made by the Department and the result are only one factor of many which the trial court must consider. In this case, the Trial Court found that DCS had made reasonable efforts to help the mother, and this finding is supported by the proof.³

¹ Mother also argues that she asked for visitation after receiving the termination petition, but the statute states that “Abandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child”. Tenn. Code Ann. §36-1-102(1)(F).

² Mother asserts that she was never ordered to pay support. In Tennessee, however, the obligation to pay support exists even in the absence of a court order to do so. *State, Dept. of Children's Services v. Culbertson*, 152 S.W.3d 513 (Tenn. Ct. App. 2004).

³ It must also be noted that DCS has been forced to short circuit this process somewhat since the enactment of Tenn. Code Ann. §36-1-113(h)(1)(A), which states that a petition to terminate parental rights “shall” be filed by the department when a child has been in custody for 15 of the last

Since the statutory basis for terminating parental rights was established by clear and convincing evidence, and termination was shown to be in the child's best interests based upon the statutory criteria, we affirm the Trial Court's action in terminating the mother's parental rights.

As to the termination of the father's parental rights, the Court found that grounds were proven by clear and convincing evidence. The Court found that the conditions leading to removal persisted, and were unlikely to be remedied in the near future. The Court also found the father had failed to support the child, had failed to maintain contact, had failed to comply with his Plan, and failed to establish a suitable home.

Regarding persistence of conditions, this ground was established by clear and convincing evidence, based on the facts shown at trial, which were that the father had not completed drug treatment, was still incarcerated, and had other charges pending. Moreover, he provided no information regarding when he would be released from custody or what his plan was for his future. The statute states that termination proceedings may be based upon the fact that:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

- (i) The conditions which led to the removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s) still persist;
- (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
- (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. §36-1-113(g)(3)(A). In this case, the father's situation had not essentially changed from the time the child was removed, and there was no indication that it would be improved at any time in the near future.

The father demonstrated no immediate plans to attend a treatment program or counseling, had no home, no job, and no plan. The father had not completed the rehab program he was allowed to attend, and was dismissed from the program due to his behavior. He did not maintain contact with DCS when he was in rehab, and had to be located by the case worker. In sum, the father has shown no regard nor responsibility for the child, and clear and convincing evidence establishes

22 months.

the conditions leading to removal still persisted, and were unlikely to be remedied in the near future.

The father asserts that incarceration should not be considered a persistent condition unless the incarceration is for a term of ten or more years pursuant to Tenn. Code Ann. §36-1-113(g)(6). Incarceration was not the only factor that the Court considered, however, rather, it is the totality of the father's circumstances which shows that Tenn. Code Ann. §36-1-113(g)(3)(A) has been satisfied.

There was also clear and convincing evidence that the father had failed to substantially comply with the permanency plan. The father's duties under the plan included completion of drug rehab, to refrain from further criminal behavior, to attend a mental health assessment and follow through with suggested treatment, to attend parenting classes, and to obtain a job and a home. The evidence established the father had done none of these things, and clear and convincing evidence establishes a basis for termination on this ground as well.

The proof established that termination was in the child's best interests. Based upon the statutory factors, the proof showed that the father had made no adjustment of circumstance, conduct, or conditions that would render it safe and in the child's best interests to be in a home with him. The father had no meaningful relationship with the child, and had evidenced no interest as to the child's welfare and progress. The evidence established the child was thriving in his foster placement, and that removing him from the same would be detrimental. He had bonded with his foster parents, and they had, in fact, provided the only stable home the child has known in his short life. The proof clearly establishes that termination was in the child's best interests based on the statutory factors.

In sum, clear and convincing evidence exists to support one or more grounds for termination of each parent's parental rights, and clear and convincing evidence also established that terminations were in the child's best interests.

The Judgment of the Trial Court is affirmed, with the cost of the appeal assessed to TLPB and RJS.

HERSCHEL PICKENS FRANKS, P.J.